

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

International Union of Operating Engineers, Local 370 and Melvin E. Thoreson. Case 19–CA–27935

April 30, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On September 24, 2002, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified below and to adopt the recommended Order.

The complaint alleges that the Respondent, Operating Engineers Local 370, unlawfully discharged its paid organizer, Melvin Thoreson, in violation of Section 8(a)(3) and (1) of the Act, because he repeatedly criticized the Local for allowing employers to cease making pension fund contributions on behalf of probationary apprentices. The judge dismissed the complaint, finding that the Respondent's decision to discharge Thoreson was not motivated by animus against union organizing, that its action did not tend to encourage or discourage union membership, and further that Thoreson's conduct was neither concerted nor protected. No exceptions were filed to the dismissal of the Section 8(a)(3) allegation.

As the judge stated, "a more complex question is presented under Section 8(a)(1)." Unlike the judge, we will assume, without deciding, that Thoreson's conduct was for "mutual aid or protection" within the meaning of Section 7 and that it was therefore both protected and concerted. We conclude, however, that the Respondent has a strong legitimate interest in ensuring that its employees cooperate with its policies and that this interest outweighs whatever Section 7 interest Thoreson may have had in criticizing those policies. We therefore affirm the

¹ No party excepted to the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by telling the Charging Party that it denied his unemployment application because he filed an unfair labor practice charge.

judge's finding that Thoreson's discharge did not violate the Act.²

Facts

In April 2000, Thoreson was named the Local's organizer by its business manager, Curtis Koegen, who also serves as an employee trustee of the union pension fund and as chairman of the Local's negotiating committee. Thoreson was responsible for locating and organizing nonunion employers and employees operating heavy equipment in the construction and construction-related industries within Respondent's work jurisdiction. He also led Construction Organizing Membership Education Training ("COMET") classes that taught members how to organize.

From April 2000 until February 6, 2002, Thoreson organized no companies and no employees on his own. In July of 2001, concerned about Thoreson's poor performance, business manager Koegen brought Richard Pound, the International's organizing representative, into the Local to work with Thoreson three or four times a week in an effort to improve his organizing results. Koegen told Pound that Thoreson would be terminated if his organizing results did not improve. Later that summer, with Pound's assistance, Thoreson had his lone success as an organizer: organizing a company with four employees.

Members of the Local participate in the Engineers Local 370-AGC Retirement Trust of the Inland Empire (pension fund). The collective-bargaining agreement requires member employers to contribute to the fund at a certain sum for each compensable hour worked by employees.

In 2001, the Local realized that the number of members leaving the union each year exceeded the number of new members gained. The Local also found that employers were not hiring enough apprentices to sustain the apprenticeship program. After researching the practices of sister locals and other construction industry unions, the Local discovered that some unions sought to resolve these types of problem by waiving employer pension contributions for apprentices. As a result, at its May 4, 2001 meeting, the pension fund's board of trustees recommended that employer contributions be discontinued for probationary apprentices, conditioned on an amendment of the collective-bargaining agreement. On June

² In agreeing with his colleagues that the judge correctly dismissed the complaint allegation that the Respondent unlawfully discharged its paid organizer, Melvin Thoreson, in violation of Section 8(a)(1) because he disparaged the Local for allowing employers to cease making pension contributions on behalf of probationary apprentices, Member Schaumber would adopt the judge's analysis on this issue. However, he would not rely on fn. 6 of the judge's decision.

27, 2001, a letter of understanding, signed by Koegen, acting as the chairman of the negotiating committee, amended the collective-bargaining agreement, waiving pension contributions by employers for probationary apprentices.

In late 2001, several months after the contribution waiver was put into effect, Thoreson overheard Shelly Street, an apprentice, talking about the policy. She explained the waiver to Thoreson. After admitting he did not know the reason for the waiver and needed to learn more about it, Thoreson stated that the waiver was not a good idea and criticized it as a product of unwise concessionary bargaining.

At least once, and perhaps twice, in late 2001, Thoreson discussed the contribution waiver with Koegen. Koegen explained the reasons for the decision to Thoreson, and Thoreson then expressed his disagreement with the policy. In late January 2002, Thoreson had a similar exchange with Mike Mitchell, the Local's assistant business agent, concerning the waiver. On January 29, 2002, Thoreson discussed the contribution waiver with apprentices in his COMET class. On February 1, at a union meeting, Thoreson raised the waiver issue during the report of Danny Thiemans, the apprenticeship coordinator. Thiemans then explained the rationale for the waiver to Thoreson and others at the meeting. The next week, Thoreson discussed the issue again with assistant business manager Mitchell. A day later, Thoreson discussed the waiver with several apprentices, including Street. The next morning, Thoreson discussed the waiver again in his COMET class. During a break in the class, one of the students, apprentice Jerome Morris, expressed his discontent with the waiver to Thoreson.

That night, February 6, Thoreson attended a regular union meeting run by Mitchell. When the meeting came to new business, Thoreson asked Mitchell why the waiver was implemented. Mitchell pointed out that he had explained the decision to Thoreson several times, but explained it once again. At that point, Mitchell answered questions about the policy from the audience. The issue was then discussed by Mitchell, Thoreson, and members of the audience, including Morris. After ten to fifteen minutes, discussion ended, and Mitchell gaveled the issue closed.

Mitchell's action angered Thoreson, who wanted to say more about the waiver. Thoreson picked up his papers and left the room. He sat in his truck for a period, and then returned to the meeting. Upon his return, Thoreson gave his regular organizer's report. However, when he was finished, he once again began to discuss the waiver. At some point in his discussion, Thoreson

turned to Mitchell and commented that the Local was "f***ing" the apprentices.

The next morning, Mitchell telephoned Koegen and described Thoreson's behavior at the meeting. Koegen told Mitchell to terminate Thoreson.³ Later that morning, Mitchell informed Thoreson that he was terminated.

The Judge's Decision and the Parties' Positions

The judge dismissed the complaint allegations challenging Thoreson's discharge. As to the Section 8(a)(1) allegation,⁴ in the judge's view, mutual aid or protection of employees within the meaning of Section 7 of the Act was not Thoreson's purpose, and his activity, therefore, was neither concerted nor protected. The judge found that Thoreson's actions were not concerted, insofar as he was not acting with or on the authority of other employees, but rather solely on his own behalf. His rhetoric, the judge found, was more in the nature of an individual seeking to position himself for a run at union office. And his behavior was "not that of an individual seeking to protect the interests of employees. Instead, it was to challenge the integrity of the service which the Union provides to its membership." The judge found that a union employee (as opposed to a union member) who disparages the way the union represents its members is no more protected than any other employee who disparages his employer's product or service.

In exceptions, the General Counsel argues that Thoreson was engaged in intraunion and other protected concerted activities at the February 6 meeting, and that his statement to the effect that the Local was abusing the apprentices was not so egregious that it lost the protection of the Act. He therefore contends that Thoreson was discharged for his protected activity. The Respondent contends that the judge correctly found that Thoreson's conduct was neither concerted nor protected intraunion activity, that a union may properly value loyalty and cooperation of its employees, and that, in any event, Thoreson was discharged for his utter failure as an organizer, compounded by his unprofessional behavior at the February 6 meeting—not for his alleged protected activities.

For the reasons explained below, we affirm the judge's dismissal of the complaint.

³ The judge found that even before the February 6 meeting, Koegen had become dissatisfied with Thoreson's performance as an organizer, did not regard him as an asset to the Union, and had decided to discharge him because of reports concerning "Thoreson's desultory approach to his job." No exceptions have been filed to that finding.

⁴ As noted, *supra*, the judge found that the discharge did not violate Sec. 8(a)(3), and no exceptions were filed to this finding.

Analysis

The issue before us is whether a union may lawfully discharge a paid employee in a key position such as Thoreson's for criticizing the union's collective-bargaining policies and decisions. Two distinct questions are presented. The first is whether Thoreson's criticism of the union's contribution waiver policy is concerted activity that is protected from employer interference by Sections 7 and 8(a)(1) of the Act. Unlike the judge, we will assume, without deciding, that as a statutory employee himself,⁵ Thoreson was engaged in concerted activity at the February 6 meeting consistent with the "mutual aid or protection" clause of Section 7. See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)(statutory definition of "employee" intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own; in recognition of this intent, "mutual aid or protection" language of Section 7 encompasses such activity). See also *Service Employees Local 254 (Brandeis University)*, 332 NLRB 1118, 1122 & fn. 13 (2000)(steward had Section 7 right to question adequacy of his union's representation of the bargaining unit). That however does not end our inquiry.

A second question is whether the Respondent has a legitimate countervailing interest that outweighs the exercise of Thoreson's Section 7 rights. In determining whether employer actions constitute unlawful interference with employees' exercise of their Section 7 rights, the Board and the courts may balance employees' Section 7 rights with their employer's countervailing legitimate interests. See, e.g., *Eastex, Inc.*, supra (employees' right to distribute newsletter on employer's property, protected under "mutual aid or protection" clause of Section 7, balanced against employer's property rights); *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945)("adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments."). We therefore will balance Thoreson's (assumed) right to engage in this activity against the legitimacy of the employer interest at stake.

In this case, the employer interest at stake—i.e., the Respondent's institutional interest as both an employer and a union—is well grounded in federal labor policy. The Board and the courts have treated union-employee loyalty to the union as a legitimate consideration and

have permitted unions to terminate various staff members for dissident activities. See *Finnegan v. Leu*, 456 U.S. 431 (1982); *Brandeis University*, supra, 332 NLRB at 1122; *Shenango, Inc.*, 237 NLRB 1355 (1978). Similarly, as the exclusive representative of employees, the Union has a legitimate interest in speaking with one voice. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 70 (1975). As the Supreme Court there observed, a union has "a legitimate interest in presenting a united front . . . and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests." *Id.* at 70.

Accordingly, the Board has long held that a union has a right to demand cooperation from its paid employees and appointed representatives, and may discharge or remove those who are hostile to or in disagreement with the leadership in the interest of promoting internal unity. Thus, in *Shenango*, supra, the Board found that the union president lawfully removed a plant safety committee chairman who campaigned for another candidate, because "the union is legitimately entitled to hostility towards dissidence in such positions where teamwork, loyalty and cooperation are necessary to enable the union to administer the contract." In *Brandeis*, supra, the Board held that the union lawfully removed a member from his position as union representative on the contractual labor-management committee because the member's interest "in being elected to his union positions does not outweigh the Union's legitimate interest in ensuring the undivided loyalty of those who represent it in dealing with the employer about working conditions." 332 NLRB at 1123.⁶

In light of these precedents,⁷ Koegen and Local 370 could legitimately demand the loyal service and cooperation of Local 370's employees in important positions like Thoreson's in the implementation of its policies. Thoreson, however, was anything but cooperative. Even after Local 370 officials Koegen, Mitchell, and Thiemans repeatedly explained the reasons for the contribution

⁵ The Respondent has not asserted that because Thoreson carries out its policies he is a managerial employee, excluded from the coverage of the Act.

⁶ Similarly, in *Finnegan v. Leu*, 456 U.S. 431, 442 (1982), the Supreme Court held that nothing in the Labor Management Reporting and Disclosure Act prohibited an elected union president from removing appointed business agents who campaigned for another candidate, because a union president must have the power to appoint agents of his choice to carry out his policies.

⁷ Although *Brandeis* and *Shenango* involved alleged violations of Sec. 8(b)(1)(A), rather than Sec. 8(a)(1), they describe the legitimate interest at stake here and apply a balancing test that is appropriate here as well. Both types of cases implicate conflict between two important elements of our federal labor policy: the protection of employees' Sec. 7 rights and the legitimate interest that unions have in the loyalty of their employees to union policies.

waiver, Thoreson persistently criticized it in the course of his employment teaching COMET classes, as well as in union meetings. Thoreson essentially took it upon himself to protest the contribution waiver on behalf of the apprentices and used his position to do so.

Thoreson's uncooperative behavior reached a crescendo at the February 6 union meeting. At that meeting, Thoreson raised the issue once again. After yet another round of explanations of the policy by assistant business agent Mitchell, and a 15-20 minute discussion of the issue, Mitchell gaveled the issue closed. Angered that he was unable to say more, Thoreson stormed out. When he returned, taking advantage of the fact that his regular organizing report gave him the floor, Thoreson launched additional attacks on the waiver, including his statement that the Local was "f***ing" the apprentices.

Local 370 had a legitimate interest in the support of its key paid employees for its contribution waiver policy. Therefore, it had legitimate and substantial reasons to be hostile to Thoreson for his relentless attacks on that policy. *Brandeis*, 332 NLRB at 1122, citing *Shenango*, 237 NLRB at 1355.

By contrast, Thoreson's Section 7 interests, if any, are much less substantial. By Thoreson's own admission, the contribution waiver had no impact on his own working conditions as an employee of the Local. To the extent that Thoreson's conduct might be described as making common cause, as an employee, with the apprentices, his efforts were not directed toward the apprentices' employers, but toward the policies of their bargaining representative, which happened to be his employer.⁸ In this particular context, we conclude that any arguable Section 7 interest belonging to Thoreson was outweighed by the strong legitimate interest of Local 370 in ensuring loyalty by its key paid employees to its policies. Accordingly, Thoreson's discharge did not violate Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Union of Operating Engineers, Local 370, its officers, agents, and representatives, shall take the action set forth in the Order.

Dated, Washington, D.C. April 30, 2004

Wilma B. Liebman, Member

⁸ Because Local 370 took no action against Thoreson as a union member, there is no reason to believe that union members *not* employed by the Local would fear that they would risk union discipline if they protested the contribution waiver.

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Daniel Sanders, for the General Counsel

Steven A. Crumb, Crumb & Munding, of Spokane, Washington, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Spokane, Washington, on June 25–26, 2002, on a complaint issued on April 30, 2002, by the Regional Director for Region 19. The complaint is based upon an unfair labor practice charge filed by Melvin E. Thoresen, an Individual (Thoresen or the Charging Party), on February 15, 2002,¹ and amended on April 30. It alleges that Respondent, International Union of Operating Engineers, Local 370, AFL–CIO, (Respondent) has violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). Respondent denies the allegations and asserts that Thoresen did not engage in activity protected by Section 7 of the Act

ISSUES

The issue presented is whether Respondent, a labor organization acting in its capacity as an employer, unlawfully discharged Thoresen, employed as a staff member, serving as one of its organizers. The General Counsel asserts that Thoresen was fired for his concerted protected activity and/or because of his internal union activities. Respondent contends it fired Thoresen for good cause and that Thoresen's conduct did not rise to the level of activity protected by Section 7, adding that Thoresen was failing to perform his job adequately and that the incident which triggered the discharge was not protected by the Act. In addition, there is an allegation that Respondent's business manager threatened to resist Thoresen's unemployment compensation claim because he had filed this unfair labor practice charge.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that it is a labor organization organized as an unincorporated association, headquartered in Spokane Washington. It represents employees in collective bargaining with their employers and further admits that during the calendar year 2001 it collected and received dues and initiation fees in excess of \$100,000, of which more than \$50,000 was remitted to its parent, the International Union of Operating Engineers,

¹ All dates are 2002 unless otherwise indicated.

AFL-CIO, located in Washington D.C. Accordingly, I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7).

II. THE UNFAIR LABOR PRACTICES

a. Background

Respondent is a labor union whose geographical jurisdiction extends east from the 120th meridian in Washington State (including the Tri-Cities of Pasco, Kennewick, and Richland), to the Idaho border and further east to cover much of Idaho). Its principal offices are in Spokane, but it is divided into districts, each of which has an office, including one in Pasco. Its business manager is Curt Koegen; the assistant business manager is Mike Mitchell. Respondent employs several individuals, including office clerical employees, a dispatcher, and at least one organizer. The alleged discriminatee, Mel Thoresen was formerly employed as an organizer. Respondent negotiates a master collective-bargaining agreement with the Inland Northwest Chapter of the Associated General Contractors on behalf of its member contractors, covering their construction industry employees who operate heavy equipment and machinery. One of the contract's provisions creates an apprenticeship program. In addition, the collective-bargaining contract establishes a pension fund. Both are operated under the Taft-Hartley Act as joint labor-management trusts.

During 2001 and early 2002, Respondent, the apprenticeship program and the pension plan realized that the number of retirees was exceeding the number of new entrants into the industry. In 2001, the apprenticeship plan sought to increase the number of apprentices working in the field, and added 35 new apprentices. Simultaneously, all three entities discovered that employers were not hiring apprentices with the frequency and the numbers needed to sustain the program. Not only would the 35 get insufficient employment, but there was a serious risk that they would quit the program in favor of some other kind of livelihood. Both the apprenticeship officials and the union leadership realized something needed to be done. Looking at sister locals and other construction industry unions, they learned that those unions had sought to resolve the same problem by waiving pension contributions from employers on behalf of the first-year apprentices. Respondent, after some careful thought, accepted a recommendation from its apprenticeship coordinator to try the same thing. On May 4, 2001, the apprenticeship trust approved a waiver of pension contributions for the first 1600 hours worked by an apprentice. This waiver was incorporated into the collective-bargaining agreement by a letter of understanding on June 27, 2001. The pension trust had no difficulty accepting the waiver, finding that it was not adverse to the fund.² The waiver was implemented immediately thereafter.

² See Union Exh. 20, an explanatory letter from the trust fund manager, received by stipulation in lieu of testimony. Though written a year later, it clearly explains that the waiver did not threaten the integrity of the pension fund. It was in good financial health; moreover, it already had accounted for dropouts during their first 1600 hours. Furthermore the waived contributions, if maximized for all 35 apprentices was \$140,000; yet that only amounted to 8/10,000 of 1 percent of the

The change was discussed at various union meetings which occurred around that time, but did not seem to draw much attention from the membership.

b. Mel Thoresen

Between 1994 and 1998, Respondent, under a predecessor administration, employed Mel Thoresen as a business agent attached to the Pasco district. As work slowed down at the Hanford plant, Thoresen was laid off. When Koegen became the business manager in 2000, he appointed Thoresen as the Local's organizer. Thoresen worked out of a basement office at the Union's Spokane headquarters.

Thoresen was an at-will employee. None of Respondent's employees are represented by a labor union, although it appears that most, including Thoresen, are members of Respondent. During this entire time period, Thoresen was entertaining thoughts about running against Koegen, seeking the job of business manager. A decision did not need to be made for some time, as the end of Koegen's term was in the distant future.

As an organizer, it was Thoresen's responsibility to locate nonunion employers performing business within Respondent's "work jurisdiction," i.e., operating heavy equipment in the construction and construction-related industries. Richard Pound, an international organizer, testified that an organizer's job requires him to be out of the office about 85 percent of the time, and that the job is not a 9 to 5 responsibility, but more of a 5 to 9 one. During his nearly 2-years as an organizer, Thoresen only organized one company, and that with Pound's assistance. It netted only four new members.

During the summer of 2001, Koegen realized that Thoresen had not obtained recognition from any employers during his incumbency. He had reports that Thoresen was spending most of his time in the office, rather than in the field. He had even heard reports that Thoresen was spending time playing on his personal laptop computer. Moreover, he knew that Thoresen was not keeping up-to-date on his weekly activity reports and he was having some difficulty in tracking what Thoresen was doing.³ However, Thoresen did have other duties. These principally consisted of teaching the so-called COMET (Construction Organizing Membership Education Training) classes. Conducted mostly during the winter, these were training classes regarding first, the need to organize and second, teaching organizing techniques including "salting." In any event, Koegen contacted Pound and arranged for Pound to come into Respon-

Fund's assets. Finally, the amount of benefits their contribution would have generated was so small as to be actuarially immeasurable.

³ In fact Thoresen testified he did not turn in the bimonthly report covering October and November 2001, until sometime in December. Furthermore, his entries often stopped at midday, contained some odd entries (attempted phone calls, errands to the supermarket, shoveling snow), and excessive time in performing relatively simple tasks such as drawing up boilerplate intraunion charges against union members. And, he never turned in any activity report for January 2002, or that portion of February before he was discharged. Koegen testified that he never saw the October-November bimonthly report until late February 2002 when he finally acquired the material from Thoresen's laptop. Koegen's testimony suggests that Thoresen never did turn in those reports.

dent's geographical territory to try to energize Thoresen. Pound reports that getting Thoresen motivated took a great deal of "caffeine," but once past that hurdle Thoresen would get started. Even so, it was Pound who noticed the concrete pumping equipment leading to Thoresen's only success. Indeed, Thoresen had driven by the employer's yard innumerable times unaware that there was an employer located there which should have been a target.

At one point during that summer, Thoresen became aware that Koegen was beginning to doubt him. He knew Koegen had made entries on his reports suggesting that Koegen was displeased with his performance as an organizer. It does not appear that Thoresen understood that Koegen had sought Pound's assistance because he doubted Thoresen's capability. Thoresen's performance compares poorly with that of business agent-cum-assistant business manager Mike Mitchell during the same period. Mitchell signed up 3-4 employers per year for a total of 6-8.⁴

c. Thoresen's Behavior Concerning the Apprenticeship Pension Contribution Waiver

Although the apprenticeship pension waiver had been implemented in June 2001, Thoresen inexplicably was entirely unaware of it. Sometime in late 2001 or early 2002, Thoresen had a conversation with Respondent's dispatcher, Shelley Street. Street thought that the policy was unwise, and Thoresen agreed. Shortly thereafter, Thoresen spoke to Koegen about it. Koegen told him that he didn't like it either, but there seemed to be little choice in the matter, explaining the reasoning behind it. He observed that the idea had come from apprenticeship coordinator Danny Thiemens. Sometime in January, Thoresen spoke to Mitchell about it, and Mitchell, too, explained the logic behind the decision. Both men expressed some misgivings over the waiver, but stood by it as a matter of economic necessity. Thoresen, however, could not accept it.

On February 1, Respondent conducted a general union meeting in Spokane. The meeting was chaired by Mitchell, as Koegen had departed for a 6-week program in Boston at the Harvard Business School. During that meeting, Thiemens gave his routine apprenticeship committee report. Thoresen took advantage of the opportunity to publicly question Thiemens about his recommendation and the apprenticeship committee's decision. Thoresen's questioning was aggressive, derisive, and scornful. He asserted that the waiver was nothing more than concessionary bargaining which he believed was contrary to proper trade union philosophy. Thiemens, like Koegen and Mitchell before him, again explained the reasoning behind the waiver. This was the first time Thoresen had publicly challenged the policy.

Shortly thereafter, Thiemens telephoned Mitchell about another matter. During their conversation Thiemens wondered why Thoresen had attacked him over the waiver. Mitchell was

sympathetic to Thiemens and told him he would try to smooth the matter over with Thoresen.

Thoresen testified that he received a telephone call from Mitchell the following day in which Mitchell instructed him to apologize to Thiemens. He regarded it as a threat to his job if he did not do so. Mitchell describes the conversation far more benignly. He says that after he informed Thoresen that Thiemens had been offended, Thoresen asked him what he should do, "Apologize?" Mitchell says he replied, "Well, that wouldn't be a bad idea."

Believing he had been threatened with discharge, Thoresen spoke to both the dispatcher and the office secretary about what had transpired. He says they were sympathetic to his point of view.

On Wednesday, February 6, Thoresen traveled to Pasco to conduct a COMET class during the day and to attend the Union's district meeting scheduled for Kennewick in the evening. During the class, he sought to explain to the two attendees what kind of conduct constituted protected concerted activities within the meaning of Section 7 of the Act. He contended that his conduct to protest the waiver was protected.

That evening he joined Mitchell at the head table during the union meeting. When Mitchell reached a point in the meeting where he opened the floor to new business, Thoresen raised the waiver issue again. A discussion concerning the waiver lasted for about 15 minutes, during which Mitchell explained to the approximately 31 attendees the logic behind the waiver. About that point, the discussion seemed to die down, but Thoresen continued to expostulate his point of view. Declaring that Thoresen was "beating a dead horse to death" Mitchell finally gaveled the issue closed and sought to move the meeting forward.

Thoresen, incensed by being gaveled down, collected his belongings, stood up and, making a show, visibly walked out of the meeting. He walked outside to his pickup truck. After a few minutes he was joined by one of the attendees from the COMET class who persuaded him to return to the meeting. Thoresen did so a few minutes later, sitting in the rear of the room. Mitchell continued to go through the meeting's agenda, eventually reaching a point where he called for an organizer's report, asking Thoresen to present it. Thoresen walked to the front of the room, but instead of giving his report, resumed his criticism of the Union's grant of the waiver. He was quite vehement, going so far as to say that the union was "f***ing" the apprentices. There is evidence that his performance lasted as long as 10 minutes. No one interrupted him, and when he was done, he turned to his organizing report and gave it in a professional manner.

Afterwards, at least one and probably two or three individuals approached Mitchell to complain that Thoresen had behaved inappropriately and unprofessionally. Mitchell himself was stunned by Thoresen's performance. He could not understand why Thoresen would not accept the policy; was fighting about it more than 6 months after it had been put in place; had earlier insulted Thiemens; and was denigrating the integrity of the decision. Furthermore he could not understand why Thoresen felt it necessary to grandstand in the fashion that he had. He believed Thoresen had behaved in a manner inconsistent with

⁴ Although Pound's performance as an organizer for sister Local 302 far exceeded anyone's performance for Respondent, it may be inappropriate to compare the two as Local 302 is much larger and includes western Washington, a far more populous area. It is also not clear that the time periods are the same. Even so, Thoresen's success rate is most unimpressive.

that of a hired employee who, even if he disagreed with a particular employer policy, was nonetheless obligated at the very least to tolerate, if not endorse, it. He drove back to Spokane.

Mitchell says that he had become so exercised about Thoresen's behavior he was unable to sleep that evening. Early in the morning he telephoned Koegen in Boston to describe what had happened. Koegen testified that he was already dissatisfied with Thoresen's performance as an organizer and did not regard him as an asset to the Union. While in Boston he had heard some additional negative reports concerning Thoresen's desultory approach to his job and had told Lynne Sorensen, the bookkeeper, to make out two checks for Thoresen before she left on her vacation that week. Cutting two checks meant that he had already decided to discharge Thoresen.

After listening to Mitchell's description, Koegen decided that he would not wait any more to let Thoresen go. He instructed Mitchell to discharge Thoresen at that point. Later that morning, upon Thoresen's arrival at the Spokane office, Mitchell discharged him.

Thoresen did not take it well and some name calling ensued. He had downloaded some union material onto his laptop computer and refused to turn it over to Mitchell, although he returned the office and car keys, relinquished the car and rejected an offer to drive him home.

Subsequently, Thoresen filed for unemployment compensation but was initially turned down as he had failed to properly complete his claim form. Respondent did not oppose his unemployment compensation claim. Nonetheless, when Thoresen learned that the State had denied his request for unemployment benefits, he telephoned Koegen's cell phone number. He reached Koegen as he was at the airport and complained that Respondent had denied him unemployment benefits.⁵

Koegen admits the following conversation occurred. He testified:

[WITNESS KOEGEN] I was in a crowded airport when he called me on the cell phone. I think the conversation started out that, "Curt, this is Mel, and do you realize you denied my unemployment?"

JUDGE KENNEDY: And what was your response?

THE WITNESS: "Yes." And he said, "Nobody else ever had their unemployment denied." And I was mad. He had made no comment or no attempt to contact me, so he kind of caught me off guard, and I was mad. I said that nobody else ever filed an unfair labor practice. But I did say that.

Later, Thoresen filed an appeal concerning the denial of unemployment benefits. Respondent did not file any opposition and the initial denial was reversed in favor of granting him full benefits, retroactive to his discharge. Thus, there is no evidence that Respondent actually prevented Thoresen from obtaining his benefits and it is apparent from the evidence that the only reason the unemployment authorities denied his initial application was because he failed to fill it out properly.

⁵ Thoresen did not understand the unemployment claims procedure very well, believing that the employer, not the state agency, made the decision whether to grant or deny benefits.

III. ANALYSIS AND CONCLUSIONS

A labor union, in its capacity as an employer, is subject to the same rules as any other employer engaged in interstate commerce and subject to the jurisdiction of the Act. *Office Employees International Union, Local 11 v. NLRB (Oregon Teamsters)*, 353 U.S. 313 (1957). Indeed, Section 2(2) of the Act specifically recognizes that labor unions are employers when acting as an employer. Accordingly, the Board has developed a body of jurisprudence dealing with the union and protected activities engaged in by the employees hired by a labor union. These individuals usually include office clerical staff, but occasionally cover 'professionals' such as business agents and organizers. To the extent that these individuals are statutory employees as defined by Section 2(3) they enjoy the rights guaranteed them by Section 7 of the Act. That section reads in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . .

In his brief, counsel for the General Counsel makes two alternative arguments. First, he asserts that Thoresen's conduct was protected as an intraunion activity and, second, that Thoresen's conduct was concerted and protected as defined by Section 7. He concludes, as he must, by asking whether or not Respondent discharged Thoresen for either, or both of, those two reasons. If so, under that logic, the dismissal would constitute a violation of Section 8(a)(1), or, independently, Section 8(a)(3). The General Counsel asserts that the evidence supports the conclusion that Respondent did discharge Thoresen for either or both of those reasons.

Respondent, to the contrary, argues that none of Thoresen's conduct constitutes protected concerted activity, whether intraunion or not. It observes that the driving reason behind the discharge was Thoresen's utter failure as an organizer compounded by his behavior toward Thiemens and his unprofessional conduct at the February 6 meeting in Kennewick. It draws a distinction between what he said and thought about the pension waiver issue and the theatrical manner in which he took over a union meeting, misusing his organizer's report slot and turning it into a soapbox attack on the services which the union provides its members. In some respects, it argues, Thoresen appeared to be behaving as if he was running for a union office, rather than as a professional organizer, for his performance was inconsistent with his station. That Thoresen used vulgar language in the process only served to highlight his lack of professionalism.

Before proceeding further, it should be noted that this case does not involve any claim that Thoresen was exercising rights guaranteed him under the Labor Management and Disclosure Act of 1959. It is true that Thoresen is a union member and under that statute has certain free speech rights and the right to redress insofar as any reprisals may be taken against his status as a union member. There is no contention that Respondent has taken any reprisal whatsoever against Thoresen's status as a union member. Indeed, the only discipline it has taken against

him was the discharge; Respondent has not sought to bar him from access to employment as an equipment operator. He has signed and continues to seek work from the out-of-work-list which the Union has established for its represented trade workers. Therefore, no Section 8(b)(1)(A) issue is presented.⁶

The seminal case in the Section 8(a) side of the Act concerning a union's treatment of its own employees is *Retail Clerks Local 770*, 208 NLRB 356 (1974). In that case the newly elected president of the local union determined to discharge six of the union's employees because they had supported the opposition candidate. Each of them had been active engaging in the intraunion activity of supporting the previous president. The new president explained that it was in the best interest of the membership to expect unqualified, loyal, and dedicated service to the union. He did not regard those who supported his opponent to have those attributes so he discharged them. The Board rejected the General Counsel's Section 8(a)(3) complaint observing that the discharges were not motivated by union animus and that the conduct would not have the foreseeable effect of either encouraging or discouraging union membership. It further observed that they were not engaged in traditional union organizing, i.e., seeking separate and independent representation. Nor were those employees seeking to redress grievances within the framework of the existing employer-employee relationship. Instead, their purpose was to effect a change in the top management of their employer. The Board further observed that the Act does not provide protection to those employees who choose to influence or produce changes in the management hierarchy.

Congruent with that analysis, no union animus can be discerned here, either. Thoresen was not engaging in union organizing or seeking separate and independent representation. Neither was he attempting to redress some perceived grievance within the framework of his employer-employee relationship. Instead, he was speaking out against an announced policy of the union as an institution. This conduct did not encourage or discourage union membership within the meaning of Section 8(a)(3).⁷ Accordingly, even though Thoresen's conduct may

properly be described as "intraunion", it is not the kind of union activity which Section 8(a)(3) aims to protect. If that were the case, union employees everywhere would be free to go their own direction without regard for their employer's requirements. They could just claim that whatever they were doing was "union activity" and obtain Section 8(a)(3) protection. That, of course, is absurd. All employers, even labor unions in their capacity as an employer, have the right to insist that employees perform the duties for which they are hired and to comply with company policies which are lawful and not contrary to public policy. Accordingly, the Section 8(a)(3) aspect of this case is governed by the Board's decision in *Retail Clerks Local 770*, supra, and will be dismissed.

A more complex question is presented under Section 8(a)(1). The mutual aid and protection clause of Section 7 has a broader sweep. Recently the Board adopted Judge Mary Miller Cracraft's analysis in a similar case. Specifically see *Plumbers and Pipefitters Local 412*, 328 NLRB 1079 (1999). She observed that Section 7 includes activity which might not readily be perceived as protected concerted activity, including nascent protected activity. She noted that the Board in *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986)⁸ "fully embraced" the 3rd Circuit's rule set forth in *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (1964). In *Mushroom* the court said 'mere talk' can only be found concerted when it is 'looking forward to group action'. *Meyers II* does say that concerted activity will encompass individual employees seeking to initiate or to induce or prepare for group action as well as individual employees to bring group complaints to management. Supra at 887. Furthermore, Judge Cracraft recognized that concerted activity need not be limited to the employees of a single employer. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Washington State Service Employees*, 188 NLRB 957 (1971). Employees may support employees of employers other than their own without relinquishing the protections of Section 7. Even so, neither Judge Cracraft nor the Board was able to find a Section 8(a)(1) violation when the respondent union discharged its clerical employee who had sought the assistance of her employer-union's executive board and had spoken to the next-door apprenticeship trust's clericals about her wage rate. The evidence showed that the charging party was acting on her own. She did not claim that she was acting on anyone else's behalf, or seeking to initiate, induce or prepare for group action when she met with the trust's clericals.

Here, the General Counsel does assert that the Charging Party was speaking on behalf of others and was seeking to induce statutory employees, i.e., the union membership, to take group action to change the policy concerning the pension waiver for first-year apprentices. While the argument has a certain facial appeal, in the final analysis it does not withstand scrutiny. For the behavior to be concerted activity *Meyers II* requires the individual employee to be acting with or upon the authority of other employees and not solely on his own behalf. There is only sparse evidence that Thoresen actually spoke to any affected first-year apprentice, much less obtained any war-

⁶ While not directly germane to the issues here, some of the Board's union employee jurisprudence arose in response to the Supreme Court's decisions in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) and *Scofield v. NLRB*, 394 U.S. 423 (1969). In *Carpenters Local No. 22 (Graziano Constr. Co.)*, 195 NLRB 1 (1972), the Board said it had been "charged by the Supreme Court with the duty of determining the overall legitimacy of union interests, and must therefore take into account all Federal policies and not limit ourselves to those embodied in our own Act." Recently, the Board overruled *Graziano* and its progeny while interpreting Section 7 in a Section 8(b)(1)(A) context. See *Office and Professional Employees Intern. Union, Local 251, AFL-CIO (Sandia Corp.)* 331 NLRB 1417 (2000). There the Board recognized that Section 7 did not have so broad a reach, and returned to the law as it stood before *Graziano*. The principal observation here is that reliance on any part of that jurisprudence which relies on *Graziano* to determine the breadth of Section 7 must be done with care.

⁷ Section 8(a)(3) of the Act states in pertinent part: "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage union membership in any labor organization. . . ."

⁸ Enfd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

rant to speak on his or her behalf.⁹ He says that he spoke to two clericals in the Spokane office, but does not contend that he was seeking their support or calling them to any group action. At the Pasco COMET class he did interest two members in the problem, and they thought it was a good idea if he were to speak about it at the meeting. He does not go so far as to say they were asking for any specific group action. The aim was an open discussion about the waiver. That is what happened. Thoresen's principal conduct, therefore, was to speak out at both the Spokane and Kennewick meetings expressing his dismay with the waiver, seeking to air his concerns and perhaps start a discussion about its wisdom.

The question which may properly be asked about these meetings is whether or not Thoresen was initiating or inducing anyone to engage in group action for their mutual aid and protection. The answer, rather, clearly seems to be no. On both occasions he was speaking not as one of the Union's employees, but as a union member. He was expressing serious disagreement with a decision which the elected administration had made. He regarded the decision as a detriment to unionism in general, i.e., concessionary bargaining. He thought concessionary bargaining was inimical to the union movement. It is true that he also viewed the impact of the decision as being detrimental to the well being of the first-year apprentices. He did not seem to understand, or perhaps believed to the contrary, that the decision had no financial impact on the pension trust or its ability to provide pension payments to those first-year apprentices if and when they ever reached retirement eligibility.

His rhetoric sounds more in the nature of an individual seeking to position himself for a run at union office. He had rejected every explanation which had been offered him for the decision. Moreover, he had taken no steps to confirm what he had been told. Instead, he engaged in speechifying, in Spokane publicly charging the apprenticeship coordinator Danny Thiemens with acting stupidly, if not incompetently. In Kennewick Thoresen triggered a 15-minute floor discussion and when the meeting's chairman gavelled the discussion finished, he refused to accept the ruling. Instead, in a theatrical manner, he furiously stepped down from the dais, gathered his belongings and left the meeting. A few minutes later he returned, but not to the dais. Instead he sat in the back of the room. Then, when invited to report on his duties as an organizer, he took the opportunity to spend the first 10 minutes or so resuming his rant about the policy. Finally, when done, he gave his organizing report.

His behavior here was not that of an individual seeking to protect the interests of employees. Instead, it was to challenge the integrity of the service which the Union provides to its membership. In essence, he was saying that the service which the union was providing to the first-year apprentices was inadequate, if not some sort of betrayal of union principles. While this sort of rhetoric is probably protected by the LMRDA, inso-

far as the free speech rights of a union member is concerned, an employee who maligns his employer's product or service in such fashion is not protected (save perhaps by a whistleblower law of some type).

How, for example, would this be different from an engineer volunteering to his employer's customer that the product had been made with a lesser grade steel than could have been used? Or, perhaps, an insurance salesman telling a potential customer that the product his company offered was inferior compared with what could be purchased from a competitor? In either case, the employee has said something to the customer which would result in the customer concluding that he should not do business with this employer.

Rather clearly, Respondent's customers are its members. Thoresen, during both of these meetings, was telling the membership that its leadership was doing a bad job of providing employee representation. He was not particularly interested in protecting first-year apprentices whose pension rights would not come into focus until their careers ended, no doubt many years in the future. Thoresen was interested in casting the current leadership in a bad light, most likely because he thought he could be perceived as a better advocate for the union movement than they.

Accordingly, I am unable to conclude that Thoresen was engaged in activity protected by Section 7 of the Act. Mutual aid or protection of employees was not Thoresen's purpose. His activity, therefore, was neither concerted nor protected. As I am unable to find any violation of the Act, this aspect of the complaint will be dismissed. As a prima facie case has not been established, it is unnecessary to assess whether Respondent would have discharged Thoresen because of his other shortcomings.

However, Koegen's remark to Thoresen on the telephone to the effect that Respondent had opposed Thoresen's application for unemployment compensation benefits because he had filed an unfair labor practice charge is a clear violation of Section 8(a)(1).¹⁰ *United Parcel Service*, 327 NLRB 317 (1998), enf'd. 228 F.3d 772 (6th Cir. 2000) (review sought on other issues); *NLRB v. Scrivener*, 405 U.S. 117 (1972). Suggesting to an employee that he has been denied a benefit, including those to which he is entitled by law, because he has sought the assistance of the Board is a clear interference with the rights guaranteed employees by Section 7 of the Act. Access to the Board is a paramount right which warrants protection under nearly all circumstances. The mere fact that Respondent had not actually interfered with Thoresen's efforts to obtain unemployment compensation is irrelevant. Koegen told Thoresen that he had been denied that right because he had exercised his statutory right to file a charge under the Act. The statement alone is sufficient to warrant a remedy.

IV. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and

⁹ Thoresen says that during a January 29 COMET class in Spokane he asked two apprentices if they were aware of the waiver, essentially informing them of it. He does not contend they asked him to do anything about it or that he offered to do anything about it. This does not qualify as initiating or inducing or preparing for group action.

¹⁰ This conduct is also a probable violation of Section 8(a)(4) as well, although not alleged in the complaint. It is unnecessary to analyze this further, as the remedy would not change in any event.

desist and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action shall also require Respondent to post a notice to employees announcing the remedial steps it has undertaken.

Based upon the foregoing findings of fact and analysis, I hereby issue the following

CONCLUSIONS OF LAW

1. Respondent, a labor organization, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The General Counsel has failed to make out a prima facie case that Respondent violated Section 8(a)(3) and (1) of the Act when it discharged its employee Mel Thoresen on February 7, 2002.

3. In late February 2002, Respondent violated Section 8(a)(1) of the Act when its business manager, Curt Koegen, told Thoresen that he had been denied unemployment compensation benefits because he had filed unfair labor practice charges.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, International Union of Operating Engineers, Local 370, AFL-CIO, Spokane, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they have lost a legal right such as unemployment compensation because they chose to file unfair labor practice charges with the National Labor Relations Board.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its at its headquarters and district offices in Washington and Idaho, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized

representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since February 15, 2002.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, September 24, 2002

APPENDIX

NOTICE TO EMPLOYEES

Mailed by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell employees that they have lost a legal right such as unemployment compensation because they or someone on their behalf have filed charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 370, AFL-CIO

¹¹ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."